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DATE: NOVEMBER 26, 1996

CASE NO: 94-INA-601

In the Matter of

PHENIX GROUP, INC.
Employer

on the behalf of

SANGEETA AHUJA
Alien

Before: Jarvis, Vittone and Wood
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

ORDER OF REMAND

This case arises from Phenix Group's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182 (a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined or certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through

the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On February 25, 1994, Employer filed a form ETA 750 Application for Alien Labor Certification, with the Maryland Department of Economic and Employment Development, on behalf of the Alien, Sangeeta Ahuja. AF 102. The job opportunity was listed as Administrative Assistant. Id.

On June 1, 1994, the CO issued a Notice of Findings ("NOF") in this case. AF 21. The NOF proposed to deny labor certification, in relevant part, because the wage offered by Employer was below the prevailing rate for U.S. workers similarly employed. AF 22. The NOF gave Employer the option of either rebutting the prevailing rate determination, or increasing the salary offer to equal or exceed the prevailing rate, thereafter readvertising the position. AF 22-23. Although the cover letter of the NOF directed that documentation of the remedy "must be sent to the Certifying Officer," the NOF also stated that, "failure to coordinate the advertisement with the local Job Service Office could result in the denial of your application." AF 21.

Employer requested an extension to file rebuttal, having decided to amend the wage rate and readvertise the position. AF 92. The CO granted an extension of the deadline until August 10, 1994. AF 91. In a letter dated July 11, 1994, the local employment service wrote to Employer's Counsel notifying him that the recruitment period had expired. AF 16. That letter directed Counsel to submit the "Application for Alien Labor Certification and all attendant documentation related to the Labor Certification Process" to the local employment office. Id. Furthermore, the letter warned that "FAILURE TO COMPLY WITHIN THIS PERIOD OF TIME WILL RESULT IN THE RETURN OF THE ENTIRE APPLICATION AND LOSS OF LOCAL OFFICE RECEIVING DATE." Id.

Employer sent all of the required documentation to the local employment service by certified mail which was delivered on August 9, 1994. AF 3-4. It did not send anything to the CO. After speaking to an employee in the CO's office, Employer became aware that this documentation also had to be submitted to the CO to rebut the NOF. See AF 14-15. In a letter dated August 16, 1994, Employer promptly informed the CO of this misunderstanding, and requested that the CO consider the rebuttal as timely filed. Id.

On August 26, 1994, the CO issued a letter informing Employer that, based on its failure to file rebuttal in a timely manner, the NOF had automatically become the final determination of the Secretary of Labor denying certification. AF 13. In a letter dated September 5, 1994, Employer requested Board review of this matter, asserting that because the instructions given in the NOF and the local employment service notice were ambiguous and apparently contradictory, Employer's error was understandable. AF 1-2.

DISCUSSION

The NOF in this case instructs that rebuttal documentation must be submitted to the CO. See AF 21. However, it also directs that all aspects of readvertisement must be coordinated with the local employment service. See AF 22. The local employment service's letter notifying counsel of expiration of the recruitment period explicitly ordered that the "Application for Alien Labor Certification and all attendant documentation related to the Labor Certification process" must be submitted to the local employment service office. AF 16 (emphasis added).

In the case at bench, Counsel for Employer interpreted these apparently inconsistent statements to mean that it was required to submit results of recruitment to the local employment service. AF 1-2, 14-15. In the light of the imprecise language of the NOF and the contradictory instructions of the state agency, we find that Counsel's interpretation was reasonable.¹

The Board has remanded cases where imprecise language in the NOF contributed to faulty rebuttal. See, e.g., *China Gardens*, 91-INA-192 (June 29, 1992); *U.S. Sprint*, 91-INA-269 (Oct. 5, 1992); *Babtech Enterprise Co.*, 91-INA-228 (Oct. 5, 1992). In particular, although limited to its precise facts, the Board in *Quince Orchard Veterinary Hospital*, 94-INA-11 (May 17, 1994) remanded a case where ambiguous NOF instructions, in conjunction with orders from the state agency, resulted in an employer

¹ The NOF also states:

As a point of information, while State agency personnel provide advice to employers and aliens, it is the Certifying Officer who determines whether or not regulation requirements were met. Employers and aliens should rely upon the information by the Certifying Officer *when the Notice of Findings raises deficiencies inconsistent with the advice given by the State agency personnel*. AF 23 (emphasis added).

This statement does not clarify the uncertainties that resulted from the NOF's command both to submit rebuttal documentation to the CO *and* to coordinate recruitment with the local employment service, where the service's subsequent instruction was to submit all documentation *to it*. In submitting its recruitment results to the local employment service, Employer could reasonably have believed it was not following *advice* offered by the state agency, but was carrying out the NOF's explicit orders to coordinate recruitment efforts with the service, which had instructed Employer to submit all documentation *to it*, at peril of certification being denied. AF 5.

reasonably interpreting those instructions to require submission of recruitment results to the local employment service. This case is, in relevant part, factually identical to the situation presented in *Quince Orchard*. The ambiguous language in the NOF, and the contradictory instructions of the state agency are virtually indistinguishable from the problematic passages present in the *Quince Orchard* case. Moreover, the fact that Employer's rebuttal would have been timely had a copy been sent to the CO, in addition to its prompt efforts to identify and remedy the misunderstanding, demonstrate a good faith effort to follow the instructions as it understood them. Similar action on the part of the employer in *Quince Orchard* was the basis for the Board's decision to remand the case in that matter.²

Based on counsel's reasonable reliance on an ambiguous NOF, in conjunction with the local employment service's explicit directions to file all documents with it, the Final Determination must be vacated. Accordingly,

IT IS ORDERED that this case be **REMANDED** to the CO for a ruling on the merits. If the CO again denies labor certification, the Employer and Alien shall have 35 calendar days from the date of such denial to request review, following the procedures set forth in the Final Determination. Meriko Tamaki Wong, 90-INA-407 (Jan. 27, 1990).

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

DBJ/ns/bg

² We emphasize that, because the present case is in relevant respects factually identical to *Quince Orchard*, the holding in that case remains unchanged and continues to be limited to similar facts.